Empowerment of indigenous and ethnic groups

Comparing cases on land use under the ACHPR and ECHR

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Ten years ago, the European Court of Human Rights (ECtHR) decided on the admissibility of the case *Handölsdalen Sami Village and Others v Sweden* dealing with the land use of the Sami and their reindeer herds. In the same year, the *Endorois* case was decided by the African Commission on Human and Peoples' Rights (AComHPR), concerning the land use of another indigenous people, the Endorois. The outcome of these two cases could not have been more different. While the AComHPR found in favour of the Endorois and wide-ranging compensation, the ECtHR found the application regarding the right to property inadmissible.

In the following, both cases are presented as well as a brief outlook at more recent case developments and tendencies regarding the empowerment of indigenous and ethnic groups.

Handölsdalen Sami Village and Others v Sweden

The admissibility decision on the case *Handölsdalen Sami Village and Others v Sweden* was handed down in 2009 and the merits judgement a year later. The case concerned the rights of four villages to land use for themselves and their reindeer herds. In particular, the land used for winter grazing was in question, as these areas were not used as regularly as the grazing mountains throughout the rest of the year. In 1990, over 500 landowners instigated proceedings against five Sami villages (including the four applicants). They disputed the Sami villages' claim that they had those grazing rights if not through law then through prescription from time immemorial. The Swedish Courts agreed with the landowners that the Sami villages would need contracts to establish specific grazing rights.

The Court found that the villages' claim to a right to winter grazing was not sufficiently established to qualify for protection under the right to property and found this part of the application inadmissible. The Sami villages contended that the extensive burden of proof imposed on them to provide evidence on the specific locations they had been on with their herds during the last 200 years was unreasonable and made it significantly harder for them to prove their claim to the grazing areas than for the opposing landowners to question it.

The case was only declared admissible regarding effective access to court due to high legal costs and the length of proceedings (were the Court found a violation of

the right to fair trial in the end), but not regarding the right to property. Although the villages got standing and qualified as victims, the Court did not acknowledge their claim to land use.

The more recent case *Chagos Islanders v United Kingdom* on the forced eviction of the Chagossians in the 1960s was declared manifestly ill-founded and did not include any substantive consideration of their rights.

Yordanova and Others v Bulgaria

The 2012 case *Yordanova and Others v Bulgaria* concerned a group of Roma who were facing eviction from the land where some of them lived for over forty years. The Court found that enforcing the eviction order would amount to a violation of the right to private and family life (Article 8 ECHR). However, the Court held that it was 'not necessary to examine separately' whether there would be a violation of the right to property even though they would lose their property once evicted and become homeless.

Other cases on Roma land use and eviction are pending before the Court at the moment and it remains to be seen how it will decide on their property rights (see here and here).

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

The *Endorois* case emerged from the forced removal of the Endorois from their ancestral lands around the Lake Bogoria area in Kenya and was decided by the AComHPR in 2009. Since 1978, following the establishment of a game reserve by the Kenyan government, the Endorois have been denied access to their land. They argued that their eviction took place 'without proper prior consultations, adequate and effective compensation'.

In addition to rearing cattle, the Endorois community maintained that the area around Lake Bogoria was of high cultural significance; it was used for regular ceremonies and annual gatherings with Endorois coming from the whole region (considering that their entire community numbers around 60,000).

In the admissibility section of the case, the Kenyan Government contested that the Endorois constituted a 'people' and that they would only be a sub-group of the bigger Tugen and Kalenjin tribes and not sufficiently distinguishable from them. The Commission rejected that argument and held 'that the term "indigenous" is … not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities' and 'that all attempts to define the concept recognise the linkages between people, their land, and culture' as well as self-identification.

After reaffirming the Endorois' 'sacred relationship to their land', the Commission found not only a violation of the right to property of the Endorois community (Article 14 ACHPR), but a violation of the right to religion (Article 8 ACHPR), to culture

(Article 17 (2) (3) ACHPR), to freely dispose of their natural resources (Article 21 ACHPR) and to development (Article 22 ACHPR).

African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek)

The example of the *Endorois* case has been followed by the ACtHPR in 2017 when it found a violation of similar Charter rights of the Ogiek community.

The case concerned a 2009 eviction notice requiring the Ogiek community and other settlers of the Mau Forest in Kenya to leave within 30 days. The applicant, in this case the Commission acting on a communication from two NGOs representing the Ogiek community, claimed that the Ogiek were neither consulted prior nor compensated after the eviction decision and that the eviction would perpetuate 'the historical injustices suffered by the Ogieks'.

As seen in the *Endorois* case, the respondent state again challenged the character of the Ogiek community as distinct indigenous people. However, the Court rejected that argument in a similar fashion by reference to self-identification and recognition, links to territory, voluntary perpetuation of cultural distinctiveness as well as an 'experience of subjugation … or discrimination'.

While the Court ordered the respondent state to 'take all appropriate measures within a reasonable time frame to remedy' the violations, it reserved the ruling on reparations, which is still pending. The applicant has asked the Court for wide-ranging restitution and compensation, including remedies such as the full recognition of the Ogiek as an indigenous people of Kenya, a public apology as well as the construction of a public monument. It remains to be seen how the Court will decide on those requests.

After ten years, has anything changed?

The AComHPR and the ACtHPR have shown that indigenous peoples' land rights can be successfully adjudicated in practice. Through cases brought by NGOs on behalf of indigenous peoples and a broadly framed right to property in addition to specific peoples' rights, the claims of the Endorois and Ogiek have been taken seriously. The ECtHR could similarly hear cases brought by NGOs representing indigenous and ethnic groups and perhaps interpret the right to property in a broader sense. But such developments have yet to materialise.

Looking at the bigger picture, the ACtHPR should be cautious about adopting terminology that has made its way into the minority rights debate and also the case law of the ECtHR in recent years, in particular regarding the 'vulnerable group' discussion. For instance in the *Ogiek* case, the ACtHPR referred to their 'obvious vulnerability' and the term featured in the *Endorois* case as well, but mostly in reference to other reports or international instruments.

The ECtHR has started to use this terminology to refer to groups such as the Roma and characterised them as 'a specific type of disadvantaged and vulnerable

minority'. Yet this terminology imposes another layer of stigmatisation on these groups instead of recognising and remedying the injustice that has happened to them already. In case of the ACHPR however, groups have rights they can claim and they can hold those who violate them to account. They are rightholders, they are actors – not passive objects of protection based on their vulnerability. This is one of the core strengths of the ACHPR and a much needed contribution to group empowerment under human rights law – an area where the ECHR framework still has a lot to learn.

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